

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED  
96 MAR 13 PM 2:09  
U.S. BANKRUPTCY COURT  
DIST. OF SOUTH CAROLINA

IN RE:

Rodwell Pontiac Cadillac GMC Truck, Inc.,

Debtor.

Kevin Campbell, Trustee,

Plaintiff,

v.

Barry Nester,

Defendant.

C/A No. 93-71381-W

Adv. Pro. No. 95-8292

**JUDGMENT**

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Defendant's Motion to Dismiss on the issue of waiver and/or release, treated as a motion for summary judgment pursuant to Rule 56 and Rule 7056, is denied.

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
March 13, 1996.

ENTERED

MAR 13 1996

J.G.S.

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**ORDER**

Chapter 7

THIS MATTER comes before the Court upon the Motion of the Defendant, Barry Nester, seeking to dismiss the above captioned adversary proceeding pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure.<sup>1</sup> By Order of January 26, 1996, this Court denied the Defendant's Motion to Dismiss on all grounds except for the issues of the waiver and/or release defenses. Upon the submission of evidence outside of the pleadings on the remaining issues, the Court notified the parties that pursuant to Rule 12(b), the Motion would be treated as a Motion for Summary Judgment pursuant to Rule 56 and a hearing was scheduled for February 1, 1996 at which time the parties introduced affidavits and exhibits. Based upon the affidavits, the

<sup>1</sup> Further references to the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure shall be by rule number only.

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exhibits, the pleadings and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:<sup>2</sup>

**FINDINGS OF FACT**

1. Larry Berry ("Mr. Berry"), the Defendant Barry Nester (the "Defendant" or "Mr. Nester") and David W. Rodwell, Jr., a principal of the Debtor, ("Mr. Rodwell"), entered into an agreement whereby Mr. Berry, Mr. Rodwell and the Defendant were to form a new corporation, the purpose of which was to buy certain assets of the Debtor.
2. As part of the agreement, Mr. Berry and the Defendant deposited a total of \$50,000.00 into an account opened in the name of Rodwell-Bearly Pontiac Cadillac GMC Truck ("Account").
3. Of that \$50,000.00 initial investment, the Defendant invested \$25,000.00 or one-half of the funds delivered by Mr. Berry for deposit into the Account.
4. The Defendant alleges that at certain times during 1992 and without the consent of Mr. Berry and the Defendant, Mr. Rodwell used a portion of these funds to cover operating expenses of the Debtor which was contrary to the agreement between the parties. When Mr. Berry and the Defendant learned of the unauthorized use of the funds by Mr. Rodwell, they demanded and received the immediate return of the funds to the Account by Mr. Rodwell.
5. In early 1993, the parties decided to terminate the agreement and the \$50,000.00

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<sup>2</sup> The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

was returned to Mr. Berry on February 23, 1993, who then returned \$25,000.00 to Mr. Nester. According to the allegations of the Trustee, the \$50,000.00 transfer was made by the Debtor. There was no direct transfer from Mr. Rodwell or the Debtor to the Defendant.

6. On March 11, 1993 the Debtor filed for relief under Chapter 11 of the United States Bankruptcy Code. The case converted to one under Chapter 7 on November 1, 1993 and on November 4, 1993, Kevin Campbell ("Trustee") was appointed to serve as the Chapter 7 Trustee and continues to serve in that capacity.
7. The Trustee filed a Complaint on November 18, 1994 against Mr. Berry in Adversary Proceeding No. 94-8262 seeking to avoid the transfer of \$50,000.00 to Mr. Berry from the Debtor pursuant to the provisions of 11 U.S.C. § 547<sup>3</sup>.
8. The Complaint in Adversary Proceeding No. 94-8262 sought the recovery of the allegedly preferential transfer of February 23, 1993 from Mr. Berry in the amount of \$50,000.00. The Answer to the Complaint, which was filed by Walter Bilbro, Jr., Esquire, as the attorney for Mr. Berry, (J. Ronald Jones, Jr., Esquire filed his notice of appearance in the adversary proceeding as the attorney for Mr. Berry on July 17, 1995) denies that the transfers were preferential, but does not make any reference to Mr. Nester or any transfers to Mr. Nester.
9. The Trustee and Mr. Berry entered into an agreement that compromised and settled Adversary Proceeding No. 94-88262 in the form of an order titled Order

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<sup>3</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

Approving Settlement and Compromise, Adversary Proceeding No. 94-8262 entered on October 24, 1995 ("October 24, 1995 Order"). The October 24, 1995 Order was signed by the Court without objection after it had been noticed to the creditors and other parties in interest.

10. The Notice of Settlement and Compromise of the Berry litigation (the "Notice" or "Notice of Settlement and Compromise"), which was filed with this Court on or about September 8, 1995, lists Michael H. Conrady, attorney for the Trustee ("Mr. Conrady") and J. Ronald Jones, Jr., attorney for the Defendant Berry ("Mr. Jones") as the moving parties but it is signed only by Mr. Conrady. The Notice provides as follows:

TO: All Creditors and Parties in Interest

**NOTICE OF SETTLEMENT AND COMPROMISE**

YOU ARE HEARBY NOTIFIED THAT the Trustee for the above Debtor intends to submit the following compromise or settlement to the Court for approval.

NATURE OF DISPUTE: Possible preferential or fraudulent transfer in the amount of \$50,000 from the Debtor to the Defendant within 90 days of the filing of the bankruptcy petition. The Defendant disputed that the payment was preferential in that it was the return of an earnest money deposit to the Defendant and Barry Nester through an account of a to-be-formed business. Further, the deposit was to be held in escrow in this account until such time as a new business entity could be created. The entity was not created and therefore the money was returned. The Defendant strongly disputed that this account was the Debtor's account or property of the estate.

AMOUNT DISPUTED: Although the Plaintiff initially sought Fifty Thousand Dollars, after completion of discovery it was determined that Twenty-Five Thousand (\$25,000) Dollars was the Defendants (sic) portion of the liability.

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PROPOSED SETTLEMENT OR COMPROMISE: The Defendant shall pay to the estate the sum of One-Thousand Five Hundred (\$1,500.00) Dollars, within five (5) days of final entry of the Order approving this settlement without any admission of liability. The Trustee will provide a full and final release of all claims the estate may have against the Defendant arising out of this transfer.

...

MOVING PARTIES:

Michael H. Conrady  
Attorney for the Trustee

J. Ronald Jones, Jr.  
Attorney for the Defendant

...

11. The October 24, 1995 Order approving this settlement, provides in part as follows:

The parties have resolved all of the disputes concerning the potential preferential and fraudulent transfers. In exchange for the estate's full and final release of the estate's interest in the transfers in question, the Defendant shall pay to the estate the sum of One Thousand Five and 00/100 (\$1,500) Dollars.

12. No other documents purporting to represent settlement agreements, waivers or releases were presented to the Court.
13. Mr. Nester was not a party to the adversary proceeding against Mr. Berry and apparently, as he was not listed as a creditor of the Debtor in the certificate of mailing of the Notice, did not receive a formal notice of the settlement.
14. On October 26, 1995, the Trustee filed the within adversary proceeding seeking to recover the \$25,000.00 returned to the Defendant [Nester] by Mr. Berry as a preferential transfer from the Debtor pursuant to §§547 and 550.
15. For purposes of the within motion only, counsel for the Defendant Nester conceded the existence of the allegations pursuant to §547, but raised the defense that the

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Trustee waived or otherwise released any interest or right to recover these sums as alleged preferential transfers by the Debtor through the settlement of the previous adversary proceeding with Mr. Berry.

## **CONCLUSIONS OF LAW**

### **I. SUMMARY JUDGMENT STANDARD**

To grant a Motion for Summary Judgment, this Court must find that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering the Motion, this Court is not to weigh the evidence, but rather must "determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202 (1986). In so doing, this Court must view all evidence in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Perini Corp. v. Perini Constr. Inc., 915 F.2d 121, (4th Cir.1990).

The party seeking summary judgment has the initial burden of informing the Court of the basis for its motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,'" that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 332, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1338 (4th Cir.1992), cert. den. \_\_\_ U.S. \_\_\_, 113 S.Ct. 1415, 122 L.Ed.2d 785 (1993). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

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Once this initial showing under Rule 56(c) is made, the burden of production, not persuasion, shifts to the non-moving party. The non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"

Celotex, 477 U.S. at 324, 106 S.Ct. at 2553; see also Fed.R.Civ.P. 56(e); Catawba Indian Tribe 978 F.2d. at 1338.

In meeting this burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts" Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356, and must demonstrate there is a "genuine issue for trial." Fed.R.Civ.P. Rule 56(e); Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356.

## II. WAIVER

A waiver is a "voluntary and intentional abandonment or relinquishment of a known right." Janasiks v. Fairway Oaks Villas Horizontal Property Regime, 415 S.E.2d 384, 387, 307 S.C. 339, 344 (1992). Waiver is an equitable and affirmative defense in which the burden of proof is upon the party who asserts it. Provident Life and Acc. Ins. Co. v. Driver, 415 S.E.2d 924 (S.C.App. 1994). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed at the time, actual or constructive knowledge of his rights or of all material facts upon which they depended." Janasiks, at 387-388.

The Defendant asserts that the Trustee, in his settlement of the adversary proceeding with Mr. Berry, waived his right to bring an action against Mr. Nester by settling all right to recover all or any portion of the \$50,000.00 transfer.

For purposes of the waiver defense, the Court must determine the intent of the Trustee in

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resolving this litigation with Mr. Berry, and whether or not he in fact intended to release the estate's interest in the "transfers in question", to include releasing the Defendant Nester from any potential liability.

It is clear from the Affidavit of the Trustee filed in opposition to the Summary Judgment Motion that he intended to release Mr. Berry, and Mr. Berry only, from liability through the settlement order. The Notice appears to support the Trustee's statement of his intention by its explanation that Mr. Berry's portion of the liability was \$25,000.00 and that in exchange for the settlement payment by Mr. Berry, the Trustee would release "all claims the estate may have against the Defendant [Berry] arising out of this transfer." At this stage, the issue of whether or not the Trustee intended to waive the estate's rights against the Defendant remains a genuine issue of material fact and the Defendant Nester has failed to meet his burden of proof as to demonstrate that the Trustee knowingly and voluntarily waived that right.

### III. RELEASE

The Defendant also asserts that the Trustee released the estate's interest in this transfer.

Black's Law Dictionary defines "release" as follows:

The relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced. Abandonment of claim to party against whom it exists, and is a surrender of a cause of action and may be gratuitous or for consideration. (citations omitted).

Black's Law Dictionary 1159 (5th ed. 1979). The District Court for the District of South Carolina has expounded upon this definition. Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. 416, 425 (D.S.C. 1995).

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A release is a specific type of contract and governed by the same principles of interpretation as other contracts. Cf. Lowery v. Callahan, 210 S.C. 300, 42 S.E.2d 457, 458 (1947) (noting that same principles of adequacy of consideration govern contracts and releases). "No set form of words is necessary to constitute a release." Gardner v. City of Columbia Police Dept., 216 S.C. 219, 57 S.E.2d 308, 310 (1950). Pursuant to the general rule, particular words and expressions in releases are given their ordinary meanings, unless the context indicates their use in a different sense. Id. 57 S.E.2d at 309. The construction of a release is, in the first instance, a question of law for the court. In construing the release, the court must seek to ascertain and give effect to the intention of the parties. In determining the nature of the release, the court must first look to the instrument itself. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 392 S.E.2d 477, 479 (Ct.App.1990) (citations omitted).

Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. at 425.

Following Wilson Group, this Court must first look to the instrument itself and determine as a matter of law, the nature of the release document. In this case, the Defendant asks the Court to look to the language of the October 24, 1995 Order which states "[i]n exchange for the estate's full and final release of the estate's interest in the transfers in question, the Defendant shall pay to the estate the sum of One Thousand Five and 00/100 (\$1,500) Dollars". That Order resolves the adversary proceeding between the Trustee and Mr. Berry as the Defendant therein. Mr. Nester is not a party to that proceeding or Order. Even if Mr. Nester was also being silently represented by the same attorney who represented Mr. Berry in the settlement, since Mr. Nester was not a party to the Order and proceeding he cannot claim the benefits of it without some definitive demonstration that such was the parties' intentions or under a third party beneficiary theory. Under either approach there appears to be a genuine issue of fact. As has been previously stated, the Notice of Settlement and Compromise referred to in the October 24, 1995 Order, and upon

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which the Order is based, raises an issue of whether the Trustee intended to release all possible claims against all possible parties to the \$50,000.00 transfer.

Additionally, the nature of these preference actions raise issues associated with what's been called the "conduit theory" of preferential transfer recovery law. Under this theory, some Court's have held that the Trustee does not have the right to recover the transfer from an innocent recipient of a preference or conduit who merely received and passed the transfer to the real beneficiary. See In re Harbour, 845 F.2d 1254 (4th Cir. 1988) and In re Columbia Data Products, Inc., 892 F.2d 26 (4th Cir. 1989). The Notice indicates that Mr. Berry had raised as a defense that Mr. Nester received a portion of the \$50,000.00 transfer and therefore the portion that passed to Mr. Nester could not be recovered from Mr. Berry. This Court questions the fairness in allowing the immediate recipient of a transfer to assert the innocent conduit defense, yet at the same time allowing the ultimate recipient of the payment to benefit from the defense that any settlement with the conduit amounts to a waiver or release of all actions against that ultimate recipient. Herein, the Trustee argues that if he could not recover that portion of the transfer passed through to Mr. Nester from Mr. Berry, then certainly he should not be bound in this action by any settlement with Mr. Berry.

For purposes of the motion before the Court, this Court agrees with the Trustee. There exists a genuine issue as to a material fact which this Court must determine at trial. It is, therefore

**ORDERED**, that the Defendant's Motion to Dismiss on the issue of waiver and/or release, treated as a motion for summary judgment pursuant to Rule 56 and Rule 7056, is denied.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
March 13, 1996.

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